Supreme Court of the United States

October Term, 1978

No. 78-449

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare,
Appellant,

vs.

CATHY ANN STEVENS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO DISMISS OR AFFIRM

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The Appellees move the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment and order of the United States District Court on the ground that the question on which the decision of the cause depends is so manifestly insubstantial as not to warrant further argument.

QUESTION PRESENTED

Whether §407 of the Social Security Act, which denies benefits to otherwise eligible needy families, solely because the breadwinner is female, violates the Due Process Clause of the Fifth Amendment?

STATEMENT OF THE CASE

Cathy Stevens, Rosalie McRoberts and Sonja Smith have been the breadwinners in their respective families throughout their employment careers[1]. When circumstances beyond their control led to their unemployment they exhausted all resources available to them and thereafter made application to the Ohio Department of Public Welfare for assistance pursuant to the Aid to Families with Dependent Children-Unemployed Fathers (AFDC-U) program[2]. In both the Stevens and McRoberts cases, the families were seeking medical as well as monetary assistance. This was of special concern to the Stevens family because their daughter was suffering from impetigo and each of the adults faced a potentially serious problem with stomach ulcers. In all three cases the application for assistance was denied because the family breadwinner was the female rather than the male parent. Had Mrs. Stevens', Mrs. McRoberts' or Mrs. Smith's husband had his wife's employment record the family would have been eligible for and would have received AFDC-U benefits. Solely because Cathy Stevens, Rosalie McRoberts and

1. Rosalie McRoberts is a thirty-eight (38) year old beauty salon operator and licensed cosmetologist. She operated her own beauty salon for more than ten (10) years and more recently has been employed as a beautician in shops owned and operated by others. Cathy Stevens is a twenty-two (22) year old career key punch operator with more than four (4) years of employment experience in that field. Sonja Smith is a twenty-three (23) year old medical assistant.

2. The Stevens, McRoberts and Smith families are intact families which do not qualify for Aid to Families with Dependent Children (AFDC) benefits pursuant to any of the provisions of §406 of the Social Security Act, 42 U.S.C. §606, which requires that AFDC assistance be made available only to those families in which a needy dependent child is "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent".

Sonja Smith were the breadwinners in their respective families, all family members were totally excluded from participation in the AFDC-U program.

Faced with absolute exclusion from the AFDC-U program[3], Cathy Stevens and Rosalie McRoberts commenced a class action suit on March 24, 1977, in the United States District Court for the Northern District of Ohio. Appellees sought injunctive and declaratory relief pursuant to allegations that §407 of the Social Security Act, its implementing federal regulation (45 C.F.R. §233.100), and implementing state regulation (Ohio Public Assistance Manual §314.3) were violative of the Fifth and Fourteenth Amendments to the United States Constitution. Subsequently, Sonja Smith moved to intervene in the proceedings. Following certification of the action as a class action, the District Court granted Sonja Smith's motion to intervene. On or about August 11, 1977, Appellees and Appellants cross-moved for summary judgment upon a set of stipulated facts and undisputed factual affidavits.

The facts make clear beyond cavil the operation of the AFDC-U program. The statute authorizing the program, 42 U.S.C. §607, denies federal financial assistance to families with children who are deprived of parental support or care solely because of a mother's unemployment

3. The State of Ohio has in no way endeavored to expand the reach of its AFDC-U program to aid those like appellees not covered under the federal reimbursement scheme. Further, during the pendency of this action no effort was undertaken by the State of Ohio to provide the appellees the equivalent of AFDC-U benefits. These facts distinguish the present action from *Westcott v. Califano*, No. 77-222-F (D. Mass. April 20, 1978) and *Browne v. Califano*, No. 77-1249 (E.D. Penn. June 12, 1978), in which the State of Massachusetts and the State of Pennsylvania undertook ameliorative steps with respect to the litigants by providing them the equivalent of AFDC-U benefits. No such steps were undertaken by the State of Ohio in the present case.

while at the same time providing AFDC-U payments to families with children who are deprived of parental support or care solely because of a father's unemployment[4]. The Secretary of the Department of Health, Education and Welfare has promulgated a regulation to implement 42 U.S.C. §607. This regulation, 45 C.F.R. §233.100, does not permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the mother's unemployment. However, it does permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the father's unemployment[5].

In order for any state to participate in the federal AFDC-U program it must comply with the requirements set forth in 42 U.S.C. §607 and 45 C.F.R. §233.100[6]. The State of Ohio has chosen to participate in the federal AFDC-U program. This was accomplished by the passage

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4. "3. Under 42 U.S.C. Section 607, Federal financial assistance is not available for ADC-U payments to families with children who are deprived of parental support or care solely because of the mother's unemployment. 42 U.S.C. Section 607 does provide for ADC-U payments to be made to families with children who are deprived of parental support or care solely because of the father's unemployment." Stipulations of Fact filed with the District Court [hereinafter "Stipulations"].

5. "6. 45 C.F.R. Section 233.100 does not permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the mother's unemployment. 45 C.F.R. Section 233.100 does permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the father's unemployment." Stipulations.

6. "7. States which desire to participate in the AFDC-U program must comply with the mandatory requirements of 42 U.S.C. Sections 601-610, as interpreted and implemented by regulations promulgated by HEW. The AFDC-U program is administered at the state level by the individual state which has great discretion in determining the standard of need and level of benefits for AFDC-U recipients." Stipulations.

of Ohio Revised Code Chapter 5107[7]. The distribution of AFDC-U benefits in Ohio is directly controlled by Ohio Public Assistance Manual regulation §314.3. This regulation, by its wording, limits distribution of AFDC-U assistance to families with "unemployed fathers". It makes no provision for AFDC-U assistance to families with unemployed mothers (Jurisdictional Statement, App. A, p. 5a).

The effect of both federal and state statutes and regulations is that a male breadwinner who meets the requirements qualifies his family for AFDC-U benefits, but a female breadwinner, complying with the same requirements, can never qualify her family for such benefits[8].

In his brief in support of his motion for summary judgment in the District Court, Appellant Califano admitted that §407 relies upon a "gender based distinction" in its operation. He further conceded that such a distinction could only be justified if it were "substantially related to important governmental interests" (Appellant Califano's brief supporting his Motion for Summary Judgment in the District Court, p. 2). The only governmental interests advanced by Secretary Califano in the District Court were

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7. "8. The State of Ohio has chosen to participate in the federal AFDC-U program and has done so by enactment of Chapter 5107 of the Ohio Revised Code. AFDC-U benefits are available in Ohio only under a plan approved by the Secretary of Health, Education and Welfare, Ohio Revised Code, Section 5107.03. . ." Stipulations.

8. "4. In a two-parent family, where both parents are fully capacitated, eligibility for AFDC-U benefits can only be established if based upon the unemployment of the male parent. Eligibility for the AFDC-U program cannot be established if based upon the unemployment of the female parent."

"13. Pursuant to the above enumerated statutes and regulations of the federal government and the State of Ohio, a father complying with the requirements indicated, qualifies his family for AFDC-U benefits, but a mother, complying with these same requirements, cannot qualify her family for these benefits." Stipulations.

"minimizing the economic incentives for desertion of the unemployed father" and "minimization of abuse within a social welfare program" (*Id.*). As to the latter of these, the Appellant expressed a concern exclusively with the situation where states made families "in which the father is working and the mother is unemployed eligible for assistance" (*Id.* at p. 9). At no time during the proceedings in the District Court were other arguments advanced in defense of §407. Appellant Califano further urged that if §407 were found "to be unconstitutional, the proper remedy would be to cover all unemployed parents" (*Id.* at p. 10).

On or about April 19, 1978, the District Court entered its opinion and order. It concluded that §407 established a gender-based classification with respect to the distribution of AFDC-U benefits and that the classification either entirely ignored or denigrated the efforts of female breadwinners. The court rejected the notion that the gender-based classification fixed in §407 served to achieve any legitimate government purpose and particularly noted that the classification was antithetical to family stability. For these reasons the District Court held that §407 violated the Fifth and Fourteenth Amendments to the United States Constitution. As a remedy the court adopted the suggestion of Appellant Califano and enjoined him to provide AFDC-U benefits to Appellees and the class they represented "to the same extent as such benefits are presently provided to needy families of unemployed fathers" (Jurisdictional Statement, App. A, 25a-26a).

On or about May 18, 1978, Appellant Califano filed his Notice of Appeal. Defendant Kenneth Creasy, Director of the Ohio Department of Public Welfare, did not appeal. Ohio has begun making AFDC-U payments in

accordance with the Order of the District Court. On or about July 3, 1978, the District Court filed its Judgment Entry and awarded Appellees their attorneys' fees against Defendant Creasy. Finally, on or about October 25, 1978, Appellant Califano applied in the District Court for a stay pending appeal. This application has yet to be heard.

ARGUMENT

All parties agree that the AFDC-U program established pursuant to §407 of the Social Security Act is premised upon "a distinction on the basis of gender" (Jurisdictional Statement in *Califano v. Westcott*, p. 7).

Despite the clarity of this gender-based classification, Appellant Califano argues that §407 is not "gender-biased", that it "does not discriminate in favor or against either sex" and that it "is not possible to identify a 'loser' on the basis of sex" pursuant to the requirements of the statute (Jurisdictional Statement in *Califano v. Westcott*, pp. 8-9). To say there are no "losers" created by §407 is to engage in a sophistry of the most transparent sort[9]. Each and every female breadwinner who is unemployed is a "loser" pursuant to §407. Not only is she a loser, each member of her intact family is also victimized by §407. The extent of that victimization is complete exclusion from AFDC-U benefits and from the equally crucial Medicaid program. All this is accomplished on the basis of the same kind of sex-role stereotyping which was at issue in *Califano v. Goldfarb*, 430 U.S. 199 (1976); *Wein-*

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9. The Solicitor General appears to have demonstrated a clearer understanding of impermissible gender-based discrimination and the available remedy for such discrimination when, as a circuit judge, he authored the opinion in *Kalina v. Railroad Retirement Board*, 541 F.2d 1204, 1210 (6th Cir. 1976), *aff'd* 431 U.S. 909 (1977).

berger v. Wiesenfeld, 420 U.S. 636 (1975); and *Frontiero v. Richardson,* 411 U.S. 677 (1973).

The appropriate perspective from which to analyze this gender-based classification is from the point of view of the woman who, because of her sex, suffers dissimilar treatment from men who are in all ways, save sex, similarly situated. This was the approach adopted by this Court in *Reed v. Reed,* 404 U.S. 71, 77 (1971) and its progeny and is certainly appropriate in the present action. See, *Weinberger v. Wiesenfeld, supra.*

The standard which most frequently has been applied in the gender-based classification cases, first suggested in *Reed v. Reed, supra,* is that a gender-based classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". *Reed v. Reed, supra,* 404 U.S. at 76. This heightened or intensified rational basis standard was restated in *Craig v. Boren,* 429 U.S. 190, 197 (1976) ("classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"). See, *Califano v. Goldfarb, supra; Stanton v. Stanton,* 421 U.S. 1 (1975).

In order to evaluate the validity of the gender-based classification contained in §407, it is necessary to identify the objectives of the AFDC-U program. As all parties agree, AFDC-U was created in 1961 as a consequence of the efforts of the Kennedy administration. While Appellant Califano would have this Court believe that the true objective of that program was to discourage unemployed fathers from deserting their families, an analysis of its history demonstrates that it was primarily intended to assist

in alleviating "the distress arising from the unsatisfactory performance of the economy". President's Message to Congress on Economic Growth and Recovery, 1961 U.S. Code Cong. & Admin. News 1028. To do this, AFDC-U relief was to be provided to families rendered needy by the ravages of unemployment.

The bill originally establishing the AFDC-U program was coupled with other legislation which extended unemployment compensation benefits. The aim of the two bills was delineated by Abraham Ribicoff, then Secretary of the Department of Health, Education and Welfare, in his prepared statement on the matter to the House Committee on Ways and Means.

> This bill would provide a temporary program . . . under which States could provide financial assistance to families in need because of unemployment. It is designed to help the States provide income maintenance to needy families of the unemployed as part of the administration's program to stimulate the national economy and relieve unemployment and hardships resulting therefrom.
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> . . . . .
>
> [T]here are many unemployed persons who either do not qualify for unemployment compensation benefits, have exhausted their benefits, or who, due to the size of their families or other special needs, will not receive enough from unemployment compensation to live in health and decency. To meet these needs, a supplemental program with Federal grants to States to assist them in providing payments to the needy families of the unemployed is desirable . . .
>
> The bill would make clear the intention of Congress that the additional Federal Funds provided are for the purpose of making assistance available where it is not now available to needy unemployed families or

of helping to make such assistance sufficient where it is now insufficient in States and localities that are doing something for the unemployed . . .

. . . . .

If the needs of unemployed families are to be met under existing law, the responsibility devolves primarily on the States and localities. While some of these are at least in part attempting to meet the needs of unemployed fathers, the picture is a spotty one. Much remains to be done, and the prospects are poor for substantial increases in State and local outlay.

. . . . .

On the premise that a hungry, ill-clothed child is as hungry and ill-clothed if he lives in an unbroken home as if he were orphaned or illegitimate, the program for aid to dependent children should be expanded to include any financially needy children living with any relative or relatives in a place of residence maintained by one or more of such relatives as his or their own home.

Hearings on H.R. 4884 Before the House Comm. on Ways and Means, 87th Cong., 1st Sess., 94-95 (1961)

Representative Wilbur Mills, the sponsor of the AFDC-U legislation, confirmed that the purpose of the legislation was to provide assistance to families in financial need due to the unemployment of the family breadwinner. In response to an inquiry, Representative Mills set forth the aims of the program.

> Mr. Mills. Let me ask the gentleman: Is there any objection as to justification in the mind of my friend from Iowa for these Federal funds supplementing State funds to take care of the needs of a child whose father may be unemployed, and where the need may arise as a result of the unemployment as there

> is provision for taking care of the needs of a child of another family where the need arises because of the incapacity of the father for physical or mental reasons to satisfy the needs of the child? In this instance we are talking about the incapacity of a parent to supply those needs not because of a physical or mental reasons, but because of inability on the part of a State agency, himself, or anyone else to find him employment that will serve to satisfy those needs. I am talking about the bill in this limited sense for this period of time when we do have as many unemployed people as we do; and because I recognize that only three out of five of those who are in our work force are under what we refer to as covered employment for purposes of unemployment compensation, that two of the five who work are not under the program of unemployment compensation that the States provide. I think a child can be just as much in need because of the parent's not being able to find a job as it can because of the physical condition of a parent that prevents him from working.

107 Cong. Rec. 3761 (1961).

The purpose of the original legislation is also described in the Report to the House Committee on Ways and Means. The Report states:

> The purpose of H.R. 4884 is to make available, during a 15 month period, . . . Federal grants to States wishing to extend their aid to dependent children programs under title IV of the Social Security Act to include needy children (and relatives caring for them) of unemployed parents on the same basis as Federal grants are now available to needy children (and relatives caring for them) who have been deprived of parental support by the death, absence, or incapacity of a parent. . . .

> The bill is intended to provide funds so as to enable States to aid unemployed persons and their children who are not now eligible for aid in which the Federal Government participates. This would be done within the framework and under the matching formula in the present Federal-State aid to dependent children program. It is intended that any additional Federal funds provided as a result of the enactment of this bill are to be made available for assistance (or additional assistance) to needy families, in which the breadwinner is unemployed, where such families either are not now eligible for public assistance or are eligible for public assistance only in amounts insufficient to meet their needs. It is not intended that such funds be substituted for expenditures already being made from State or local funds.

H.R. Rep. No. 28, 87th Cong., 1st Sess., 1, 3 (1961).

From all this the predominant purpose of the original AFDC-U program is easily gleaned. Stated most simply that purpose was to provide assistance to parents whose unemployment has rendered their children needy in a time of economic recession and widespread unemployment. In carrying out that program the focus of both the executive and legislative branches of government was upon the breadwinner who, through no fault of his or her own, was without employment, had exhausted reserves and was ineligible for public assistance.

Appellant Califano would have this Court believe that the motivating objective of the original AFDC-U program was to remove the incentive for an unemployed father to desert his family in order to make them eligible for assistance (Jurisdictional Statement in *Califano v. Westcott*, p. 15). While it is apparent that the issue of "fleeing

fathers" was of concern to the legislators, the original legislation cannot seriously be read to have been intended as a solution for that problem. Appellees contend that no rational argument can be mustered which would demonstrate that the temporary program enacted in 1961 to meet emergent conditions had as its purpose the long-term eradication of the incentive implicit in public assistance programs for unemployed fathers to leave the home.

The fact that both legislators and officers of the executive branch often confused or treated synonymously the terms "breadwinner" and "father" is not supportive of Appellant's position. Rather, it is prima facie evidence that members of both branches of government were involved in sex-role stereotyping by presuming that in all cases fathers are breadwinners and mothers are homemakers. This stereotypical thinking became explicit in 1968 when, in order to exclude from eligibility those families in which only one of two working parents was unemployed,[10] Congress enacted the present version of §407, providing aid only to families where the father was unemployed. While the 1968 amendments were intended to deny AFDC-U payments to families with a fully employed breadwinner[11], this aim was achieved by reliance on the notion that the breadwinner in all families would be the father. Such a presumption swept too broadly. Although the rule barred assistance to families where a breadwinner was fully employed, it also placed an insurmountable barrier before all families in which the mother was the sole breadwinner and through no fault of her own found herself unemployed and without any resources to provide for the

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10. H.R. Rep. No. 544, 90th Cong., 1st Sess., p. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess., p. 160 (1967). See also *Stevens v. Califano*, Jurisdictional Statement, App. A, 16a-17a.

11. Far from addressing the question of fleeing fathers, the 1967 amendments to §407 identified this problem as appropriate for continuing study by Congress. S. Rep. No. 744, 90th Cong., 1st Sess., p. 160 (1967).

maintenance of her intact family. This result is not reflective of Congress' reasoned judgment, nor was it contemplated, discussed or intended. It is simply the by-product of "a traditional way of thinking about females" *Califano v. Goldfarb, supra,* 430 U.S. at 223 (Stevens, J., concurring in the result): fathers of intact families are breadwinners while mothers are housekeepers.

This stereotyping has been catastrophic for Appellees and similarly situated female breadwinners. Faced with precisely the same problems and privations as male breadwinners, they and their families are uniformly denied subsistence level assistance simply because of their sex. This result is contrary to the intent of Congress and the holdings of this Court. "Archaic and overbroad" gender-based classifications which are based upon "old notions" or "casual assumptions that women are 'the weaker sex' or are more likely to be childrearers or dependents" violate the Constitution. *Stanton v. Stanton, supra,* 421 U.S. at 14; *Schlesinger v. Ballard,* 419 U.S. 498, 508 (1975); *See Reed v. Reed, supra; Frontiero v. Richardson, supra; Weinberger v. Wiesenfeld, supra; Craig v. Boren, supra; Califano v. Goldfarb, supra* (plurality opinion of Mr. Justice Brennan); *Califano v. Webster,* 430 U.S. 313 (1977). This Court struck down a similar assumption at issue in *Weinberger v. Wiesenfeld, supra,* 420 U.S. at 643 "that male workers' earnings are vital to the support of their families while the earnings of female wage earners do not significantly contribute to their families' support". Precisely the same kind of assumption is operative in §407. Social welfare programs which denigrate "the efforts of women who do work" are constitutionally intolerable and cannot be permitted to stand. *Weinberger v. Wiesenfeld, supra,* 420 U.S. at 645.

Appellant Califano's response to this conclusion is to fabricate an artificial and inaccurate description of the goal

of §407, arguing that it was designed to stem the flow of fathers from their intact families. Even were this the purpose of the Act the means used are ineffective and inappropriate. As the District Court in this case pointed out, there are two flaws in Appellant's argument. First it is premised on another old and archaic notion; males are likely to desert their families while females are not. Second, and even more telling, the program, as designed, denies benefits to each and every intact family which is dependent upon the mother for support. The only way these families can qualify for life-sustaining benefits is if one of the adults abandons the family. This invitation to abandonment is squarely in conflict with the goal Appellant Califano contends was intended by the Act. See *Stevens v. Califano,* Jurisdictional Statement, App. 19a-22a.

Appellant further suggests that Congress, in fixing the parameters of §407, did so in order to save money[12]. This Court's response to arguments concerning cost savings has been consistent. Where programs have obtained savings "by invidious distinction[s] between classes of . . . citizens"

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12. Appellant's cost estimates and cost arguments made their very first appearance in this case in footnote 6 of the Jurisdictional Statement in *Califano v. Westcott.* These arguments seem inconsistent with arguments he advanced in the District Court. There Appellant indicated that the total federal funding for the AFDC-U program as constituted in 1976 was $588,000,000 per year on behalf of 147,000 needy families in 28 states. (Appellant Califano's brief supporting his Motion for Summary Judgment in the District Court, p. 11). The Appellant would have this Court believe that the Order of the District Court, if applied nationwide, would almost double the costs of the AFDC-U program. Such figures, if accurate, are dramatic evidence that §407 is not rationally related to the goal of meeting the needs of families where the *breadwinner* is unemployed, but rather meets the needs of only those families where the *fathers* are unemployed.

In contradistinction to Appellant's calculations stand the assertions of Defendant Creasy that the class which Appellees were seeking to represent in this action consisted of a total of 6 or 7 families. Order, *Stevens v. Califano,* C77-103A, (N. Ohio, Nov. 11, 1977), p. 4 (certifying proceedings as a class action).

those programs have been invalidated on equal protection grounds. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974); *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972); *See also, Frontiero v. Richardson, supra*, 411 U.S. at 688-689; *Reed v. Reed, supra*, 404 U.S. at 76; *Califano v. Goldfarb, supra*, 430 U.S. at 204-205 (plurality opinion of Mr. Justice Brennan); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *NWRO v. Cahill*, 411 U.S. 619 (1973).

The foregoing analysis makes clear that the resolution of this case by the District Court was correct. In light of this Court's rulings in *Reed v. Reed; Stanton v. Stanton; Frontiero v. Richardson; Craig v. Boren* and *Weinberger v. Wiesenfeld*, gender-based classifications which do not bear a substantial relation to the objective of a piece of legislation and which treat similarly situated men and women dissimilarly cannot withstand scrutiny. As previously discussed, the gender-based classification at issue here does not bear a substantial relation to the goal of the AFDC-U program and bars employed women and their families from benefits received by employed men and their families. It must therefore fail. This proposition has been recognized by all courts which have reviewed the constitutionality of §407. In this case, in *Westcott v. Califano* and in *Browne v. Califano*, §407 was held unconstitutional. In not one instance has a contrary result been reached.

CONCLUSION

From the foregoing it is manifest that the instant case presents no substantial question not previously decided by this Court. The rulings of the lower courts are in accord. This case, therefore, is an appropriate one in which to affirm

the decision below or, in the alternative, to dismiss the appeal.

The constitutional question urged for reversal has been so plainly foreclosed by prior decisions of this Court as to make plenary review in this case unnecessary. Recent decisions of this Court, especially *Weinberger* and *Frontiero* have so clearly settled the federal constitutional question arising in statutes, such as §407, so as to obviate any need for plenary review. The legslative history of §407 clearly indicates that Congress was attempting to alleviate the harsh financial and social effects caused by the unemployment of the family breadwinner and inserted the sex-biased term "father" in the 1968 amendments to eliminate families wherein the primary wage earner was fully employed. The statutory sex discrimination complained of herein bears no relation to the objectives of the legislation and fails to satisfy even a "rational relationship" test.[13] Finally, Appellants have raised no new arguments justifying sex discrimination in §407 that have not previously been considered and rejected by this Court.

However, should this Court choose to note probable jurisdiction the present case ought to be heard rather than held in abeyance as suggested by Appellant Califano. The validity of §407 is squarely raised in the present proceeding. The record in this case contains all of the facts necessary for adjudication of this issue. In no other case is the question of the deprivation worked by §407 so directly at issue. Pennsylvania and Massachusetts have pro-

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13. It is irrational to distinguish between mothers and fathers when the sole question is whether needy families with children who have lost the financial support of the family breadwinner due to unemployment should be assisted. *Weinberger v. Wiesenfeld, supra* (concurring opinion of Mr. Justice Rehnquist).

vided virtually equivalent benefits to those individuals injured by §407. That has not been the case in Ohio.

Respectfully submitted,

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